

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

THE MILWAUKEE REPERTORY THEATRE, INC.¹

Employer

and

Case 30-RC-6619

UNITED SCENIC ARTISTS, LOCAL USA 829²

Petitioner

DECISION AND DIRECTION OF ELECTION³

The Union seeks to represent a bargaining unit of painters and scenic artists employed by the Employer. Following the filing of a petition, a hearing was held for a determination on two issues:

- 1) Is Charge Scenic Artist James Medved a supervisor within the meaning of Section 2(11) of the Act and therefore excluded from the unit?⁴
- 2) Are the overhires⁵ regular part-time employees that should properly be included in the unit?

As discussed below, I find that: 1) Medved is a supervisor as defined in the Act and therefore excluded from the unit, and, 2) the overhires are regular part-time employees that should be included in the unit and eligible to vote in the election if eligible under the appropriate eligibility formula. With these two determinations, the following employees are a unit

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board (Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

⁴ An additional issue addressed at hearing was whether or not Medved shared a sufficient community of interest with the bargaining unit, as to be included in the unit. However, as Medved is a supervisor under the Act, the issue of his community of interest with the unit is moot. ⁵

Overhires are also referred to as "jobbers."

appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time painters and scenic artists employed by the Employer at its Milwaukee, Wisconsin facility; excluding all other employees, interns, guards and supervisors as defined in the Act.⁶

FACTS

The Employer performs live theater in Milwaukee, Wisconsin and has approximately 16 productions scheduled for the current season. The Employer's production department is headed by the production manager, Judy Berdan, and is organized into five smaller departments that report to her. Each of these departments is headed by a department head or leader who reports to Berdan and is responsible for supervising the work of employees in the department. The five departments are the scenery department, costume department, prop department, lights and sound department, and the paint shop.

The Union has filed a petition to represent the employees in the paint shop. The head of the paint shop is James Medved, the Charge Scenic Artist. In addition to Medved, there are two full-time employees, Shannon Mann and Susannah Barnes, who work in the paint shop as scenic artists. Additionally, interns are also used, and the paint shop hires part-time employees as required by the needs of the department. These part-time employees are referred to as overhires, and are hired from a roster of available artists kept by the Employer. Medved is responsible for hiring and assigning tasks to the overhires.

In addition to hiring overhires, as Charge Scenic Artist, Medved is involved in the hiring

⁶The parties filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

of scenic artists for the paint shop. Specifically, he was involved in the hiring of Susannah Barnes in 2002. The production manager at the time, Carey Lawless, and Medved developed a job announcement for the scenic artist position and solicited applications. Applications were sent to Lawless, who then forwarded them to Medved for consideration. Medved reviewed the application material, checked references, and interviewed candidates before finally recommending the hire of Barnes. Lawless did not interview Barnes or review her portfolio. Once Medved made his recommendation, Lawless contacted Barnes and offered her the position.

DISCUSSION

1. Charge Scenic Artist James Medved is a supervisor within the meaning of Section 2(11) of the Act and therefore excluded from the unit.

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor...” The term “supervisor” is defined in Section 2(11) of the Act as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess the authority to engage in any one of the specific criteria listed, or have the authority to effectively recommend any such action, as long as the performance of that function is not routine, but requires the use of independent judgment. See e.g., *Fred Meyer Alaska, Inc.*, 334 NLRB No. 94 (2001). The burden of proving that the contested individuals are supervisors within the meaning of Section 2(11) rests with the party who seeks their exclusion. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Under these standards, I find that the Employer has met its burden of proof, and the Charge Scenic Artist is a supervisor under the Act.

The record demonstrates that Medved, as the Charge Scenic Artist, is an active

participant in hiring overhires for the paint department, and additionally, acted in a supervisory capacity in the hiring process of Susannah Barnes to the paint shop. Though the evidence at hearing demonstrated that Medved's position carries additional primary and secondary indicia of supervisory status (e.g., Medved conducts the appraisals of the other scenic artists including probationary reviews, attends department head meetings, is involved in employee scheduling, and is paid more for his position as Charge Scenic Artist), the evidence is clear that Medved has the authority to hire, or at a minimum effectively recommend to hire, and is therefore a supervisor under the Act.

The Union disputes Medved's supervisory status, and emphasizes the collaborative nature among paint shop employees in regards to issues of work assignment and hiring. However, in instances like the hiring of Barnes, though Medved shared her portfolio with other artists in the paint shop, it is clear that his role was different than the other artists. Medved not only interviewed Barnes, but also did her probationary evaluation, resulting in her permanent retention. Despite collaboration that does exist in the paint shop, Medved's role is different than the other scenic artists, and the differences in his role are of consequence.

The Union also argues against Medved's supervisory status by citing the absence of employee grievances and discipline in the past, and by claiming an industry practice of including Charge Scenic Artists in bargaining units. However, despite the absence of past grievances or discipline, and despite how other parties have defined the position in other collective bargaining agreements, the determinative factor in deciding supervisory status is the authority that Medved holds in his position. Medved's authority determines his status under the Act, and the evidence clearly demonstrates he exercises supervisory authority in hiring. The Union has failed to refute the evidence. In the event the Union is certified, the Union's arguments regarding the

performance of bargaining unit work by Medved would be a matter for collective bargaining. In any event, Medved is ineligible to vote in the election.

2. The overhires are regular part-time employees and are properly included in the unit.

In a recent decision with facts similar to the current case, the Board found that part-time employees in theatrical productions should be included in the bargaining unit along with employees regularly employed by an employer. *Steppenwolf Theatre Company*, 342 NLRB No. 7 (2004). The Board held that its most widely-used formula, articulated in *Davison-Paxon Co.*, 185 NLRB 21 (1970), was the appropriate formula to use in determining which employees were eligible to vote. This formula allows that employees who regularly average 4 or more hours per week in the quarter prior to the eligibility date have a sufficient regularity of employment to share a community of interest with unit employees, and are therefore eligible to vote. This formula should also be applied to the current case.

The Employer claims this formula is not appropriate, and insists that the appropriate reading of the stipulated unit description precludes inclusion of the overhires. Although I agree the stipulated unit description is an appropriate unit, I disagree with the Employer's interpretation of the description to exclude overhires. The work performed by the overhires is indistinguishable from the work done by unit painters, and although the parties could have specifically agreed to exclude the overhires, they did not do so. Therefore, the determination as to whether overhires are regular part-time employees, as in *Steppenwolf Theatre Company*, is the function of the *Davison-Paxon* formula.

Though the Employer argues that its overhires are not regular part-time employees, its claimed distinctions made between the overhires in the current case and those in *Steppenwolf Theatre* are not persuasive. Those distinctions go to the number of hours worked, the regularity of employment and the history of recall, all of which are factors the eligibility formula adopted is

designed for in determining a specific overhire's inclusion in the unit. The formula ensures the overhires who vote will have a shared community of interest with the rest of the unit, and any concern as to appropriateness of including an overhire is addressed by the application of the formula to the potential voter. The overhires who fall within the definition of the formula are therefore eligible to vote.⁷

CONCLUSION

In summary, first, I find the Charge Scenic Artist is a supervisor within the meaning of Section 2(11) of the Act, and is therefore ineligible to vote in the election. Second, I find the overhires are properly included in the unit, and an overhire is eligible to vote if he or she has regularly averaged 4 or more hours per week in the quarter prior to the eligibility date.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

⁷Though the record at hearing is not clear as to which overhires are eligible under this formula, in the Employer's brief, it indicates two overhires, Katherine Prei and Kristin Geran, would be eligible to vote. Thus it appears that there may be approximately four eligible voters. The application of the *Davison-Paxon* formula will determine the actual number of eligible voters.

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Scenic Artists, Local USA 829.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before October 28, 2005.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by November 4, 2005.** Signed at Milwaukee, Wisconsin on October 21, 2005.

/s/Irving E. Gottschalk
Irving E. Gottschalk, Acting Regional Director
National Labor Relations Board Thirtieth Region
Henry S. Reuss Federal Plaza, Suite 700
310 West Wisconsin Avenue Milwaukee,
Wisconsin 53203